128 (1)

Supreme Court, U.S.
FILED

081442 APR 30 2009

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No: __ -

IN THE
Supreme Court of the United States

Andrew Bestor

Petitioner

v.

Federal Bureau of Investigation

Respondent

On Petition for Writ of Certiorari to
The United States Court of Appeals
for the District of Columbia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS

1. Litigating a 5 U.S.C. 552 Freedom Of Information Act case in the District of Columbia against an agency asserting a blanket 'Glomar' exemption to the Act, shouldn't the district court warn the pro se litigant under Fox v. Strickland to focus on the 5 U.S.C. 552 paragraph (b) exemptions rather than 'what became redundant with the Glomar response' evidentiary concepts or 'yes-they-do-too-have-files-on-me' arguments? If an agency asserts a 'Glomar' response as an Alford plea 'acknowledging the situation without admitting guilt but trusting in the district court', doesn't the court's failure to direct the plaintiff to the 5 U.S.C. 552 para (b) exemptions which would allow him to rebut the agency's 'Glomar' response equate to a process deprivation?

2. Once the plaintiff's claims were openly articulated with particular specificity in the district court and on appeal, isn't it plain error for the courts to let an agency's 'Glomar' response reduce their burden of demonstrating that no genuine issue of material fact existed in a 5 U.S.C. 552 FOIA suit?

3. At least in this case, given the specificity of the 5 U.S.C. 552(b) exemptions, didn't the court err in accepting a 'Glomar' assertation which effectively gave an agency discretionary power in spite of very clear legislative directive in law to the contrary?

CORPORATE DISCLOSURE STATEMENT

Bestor is a private individual representing himself against the Federal Bureau of Investigation.

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STATEMENT OF JURISDICTION

Bestor filed suit and appealed under 5 U.S.C. 552. Public information; agency rules, opinions, orders, records, and proceedings [generally known as the Freedom Of Information Act (FOIA)], in the United States District Court for the District of Columbia Circuit 1:06-cv-01745 RMU, and United States Court of Appeals for the District of Columbia 08-5076. His final appeals denied February 11, 2009, he petitions this Court within 90 days.

STATEMENT OF THE CASE

Working in Tokyo 1992 to 1996, Bestor was twice drugged and kidnapped out of his apartment. On each occasion assailants covertly implanted thin wires densely populated with electrode sites in his physical body; on the first occasion in his limbs, trunk, throat/neck as well as under the skin on his head; on the second occasion in his skull and brain.

Jimmy Carter is said to have been similarly twice drugged and kidnapped out of the White House by assailants in the Secret Service who had him implanted, and Reagan is said to have been similarly implanted immediately following the Hinckley incident giving rise to the possibility the Secret Service shot him [Reagan] in the car. Without mentioning the points about Carter and Reagan but against that background Bestor entered the courts in the District of Columbia in late 2001, filing his first real complaint in early 2002, see Bestor v. United

States, 02-cv-0279 RWR, appeal 02-5271, S.Ct. 02-1539, 539 U.S. 904 and 539 U.S. 976.

Bestor then tried to resolve the issue on his own using a 'long arm statute' but the district court would not permit it, see Bestor v. Ashley, 02-cv-1583. Bestor then went after particular assailants, see Bestor v. Lieberman, 03-cv-1470, with reassignment appealed 03-5295, S.Ct. 03-1657, 543 U.S. 818, 91 Fed Appx. 567, and the judgment appealed 05-5191, S.Ct. 06-0069, 549 U.S. [ ], 166 L.Ed. 2d [147?].

Claiming 'two additional cases beyond his' significantly reflected localized and highly defined illicit activity, Bestor then went after the responsible agency in Bestor v. CIA, In re Michael Bruce Ross, 04-cv-2049, appealed 04-5438, 05-5006, 05-5056, with this Court returning Bestor's petition for certiorari undocketed in May 2005 after the execution of murderer Ross who Bestor claims was significantly associated with the CIA.
Now Bestor acts against the Federal Bureau of Investigation in the instant case based on the agency [Bureau] withholding documents in violation of 5 USC 552.
Irregularity has colored the proceedings. Appealing reassignment from one judge to another in Lieberman [appeal 03-5295, S.Ct. 03-1657, 543 U.S. 818. 91 Fed Appx. 567], Bestor was forced to attack the local rules of the District Court for the District of Columbia.... which kept changing during his appeal

process. Local rules turned out to be 'migratory' rules pertaining to the scheduling committee.

Which then, after his court action ended, changed back to the way they had been before he started.
In the instant case against the FBI the misconduct has taken place in a yet more brazen manner:
1. After a lengthy FOIA request/appeal process directly involving the Bureau and then the lower court sequence, on appeal to the United States Court of Appeals for the District of Columbia the appeal court [Henderson, Randolph and Brown] asked the FBI to check Bestor's file number for them [02 Sept 2008 PER CURIAM ORDER].
Is Bestor's file number in the FBI's file system 62C-HQ-1077229 as typed on the FBI letter to a then-seated United States Senator which Bestor submitted as evidence with the number '13,190' handwritten next to it, or is it not?
After going the whole way down the road - after the FOIA request/agency appeal/preparation and district court process- the FBI said 'no, it is not', and claimed they had made a typographical error on the original correspondence [21 Oct 2008 REPLY FILED].

That discovery came so late in the process it should be taken as sufficient cause to remand this case to the district court. As we come to see, their 'error' suggests they never searched at all for documentation on Bestor but entered an affidavit in bad faith, attempting to use it as a 'cover', but that

was not the end of the matter. 'The worst possible scenario' would be the agency - here the FBI - lying to both the court and to Bestor. Them never telling the court they were acting to assert a Glomar privilege, but surely the court would have caught that in the ensuing circus of 'swapped and replaced filings.' If they did, they - the court - apparently turned a blind eye.

2. Perhaps reflecting an intentional attack strategy it is nearly impossible for Bestor to defend against, the Assistant United States attorney then late in the appeal process sent a court filing briefly referencing the 'Glomar possibility' to Bestor's home served via regular first class mail. Bestor received the filing, read it, thought about it intending to respond - and it disappeared. Gone out of Bestor's home, strongly suggesting somebody turned a 'sneak an' peek' entry into a 'take an' walk' burglary.
The later point should not have been impossible for Bestor to overcome; he then went down to Prettyman to read the copy filed with the court. Only the filing was not in there either; 'they' - either the FBI or their attorneys - apparently changed their minds and decided to entirely evade 'the Glomar issue', equating to a 'hit and run' Glomar attack on both Bestor and the 'by then' several courts and panels. The FBI had people go in and get 'em out. Search, seizure, and run. Have they since put it back? Last night or this morning? Are they trying to evade a sanction or make the pro se litigant look stupid? They are

powerful government employees, and he is obviously a repeatedly failed pro se litigant who has never once found favor with the courts, but they should not be allowed to cheat in their filings and it is a mark of shame that the district and appeal courts allow and perhaps even encourage it.

Plainly stated, at that point it came to seem possible they had lied to the district court in never telling that court the Glomar 'situation' existed, and, then forced out into the open by the appeals court, they tried to obliquely address the issue - for a few moments before losing heart and 'taking back' their filing, only to perhaps reassert - reinsert - the issue after Bestor's appeal was denied.

Pathetic in every respect, the District of Columbia is suppose to be the home turf of the 5 U.S.C. 552 legislation, with J. Skelly Wright addressing 'bad faith on the part of the agency in Allen v. Central Intelligence Agency, 636 F.2d 1287 (1980) at 1298:

Where there is evidence of bad faith on the part of the agency, the representations of the agency lose all trustworthiness. In camera inspection in such situations is "plainly necessary" unless it is clear to the court that the withholding by the agency would not be sustainable after in camera inspection.

Obviously Bestor claims that the appeals court seeking the clarification was an affirmative act the agency [FBI or United States Attorneys] then turned and furthered; in general 'fraud on the court' should not be taken as benign or inadvertent anyway but here it certainly wasn't.

The appeals court found against Bestor.

In turn the emergent fraud in the file number and Glomar controversy including the theft of the filing leads to yet another point of glaring irregularity in procedural history. Bestor was twice implanted in Tokyo with an electrode system apparently developed by the CIA. The first time was in 1994 and the second time was in 1995. The United States Court of Appeals for District of Columbia - Ward, Henderson, and Randolph [sitting in the United States] - wrote an opinion which in a footnote hugely disparaged electrode systems a few months after Bestor was implanted in Tokyo [Best v. Kelly, 39 F.3d 328, footnote at 330 (D.C. Cir.1994) citing to Wilson v. United States Federal Government, Civ. Action No. 92-2159 (D.D.C.1992) - read it yourself]. That MAY - or may not - have been coincidental to Bestor in particular being implanted but is almost certainly one aspect of a larger pattern of CIA activity including everything from NIH research to deployments which were the focus of Bestor v. CIA, In re Michael Bruce Ross. Here immediately in the case at bar, Henderson and Randolph sat on the same panel that asked the FBI to clarify the file number 62C-HQ-1077229. After either receiving the response or in 'turning the corner' to rule against Bestor - at least superficially accepting without question the claim of the agency [FBI] the number as written was a harmless typographical mistake, if they were not actually a party to arranging that alibi

- the second conspirator in the 1994 ruling, Randolph, quit the appeals court panel hearing this case to be replaced by Kavanaugh which Bestor respectfully suggests goes too far in a Glomar case.

The judiciary never should have been utilized in a cover scenario to begin with in 1994, but to 'double up' the bet - Henderson minus the departing Randolph risking not just her own stature but the reputation of the judiciary - is clear error.
For them to then cover the FBI newly asserting and then quickly removing 'the transient Glomar filing' is absolutely farcical.

A case in some ways similar to Bestor was utilized by the CIA in media - Bilyeu v. Clinton which became Bilyeu v. Federal Government, 01-cv-00321 RWR - and got appealed as 02-5008 before Ginsburg, Randolph and Garland, which may have factored into Randolph's departure here.
Of course the next step was taken. On 02 March 2009 it abruptly became clear to Bestor that even the district court Opinion 12 in this case is vulnerable, and has been 'revised' at some point since it issued on 06 August 2007 to remove verbiage which Bestor used at 9 Memorandum in opposition to 8 Motion for Summary Judgment in describing the plight of the 5 U.S.C. 552 litigant at page 2 ["...3. Bestor does not - indeed he cannot - challenge the 'reasonableness of their search' or 'the totality of it' at this time....."].
The quote does trace to law; in their Opinion the

district court tried to slam Bestor with his own citation but then belatedly realized he was in fact correct so they then took it out of the Opinion after it was already issued. However unusual, there is a procedure for reissuing an opinion which wasn't followed here - they just swapped in a new one with what is now a blank space on the page.
Vaughn v. Rosen, 484 F.2d 820 at 823. In light of this overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information.... [The Government's] factual characterization [of the documents and, if the Government is asserting a situational argument here, of the documents in perhaps a time context] may or may not be accurate. It is clear, however, that appellant cannot state that, as a matter of his knowledge, this characterization is untrue. Neither can he determine if the personal items, assuming they do exist, are so inextricably bound up in the bulk of the documents that they cannot be separated out. The best appellant can do is to argue that the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they contain such personal information. 823-824.

It is not clear why the district court initially tried to use his own quote against Bestor beyond that it has or anyway 'had' a mocking quality in the context of

the Opinion. The uncomfortable conclusion is that either a clerk wrote the Opinion and the judge did not catch the point on review though it was difficult to miss, or, more likely, the appeals court saw that and understood it was a clear ground for reversal/ remand, perhaps having their clerks work with the district court clerks downstairs in Prettyman to rectify the mistake short of finding for Bestor. Justice may weary of pro se litigants claiming others racketeer or conspire against them [pro se lawsuit against a seated judge reaches chambers with an unsigned order for the 'circular file'], but here the case is circumstantial and so clearly in the record this Court must take cognizance of it.

Not knowing what other steps he can take:
The appeals court ignoring him en banc and for a panel rehearing beyond the single opportunity they provided the FBI to come up with an excuse about the file number while ignoring the broader circumstances he outlined,
ignoring the actions of the FBI checking against a database when Bestor contacted them in Seattle [perhaps legitimately withheld from discovery under a paragraph (b) exemption but not at the threshold step when Bestor cited the instance for purposes of gaining access to the courts],
ignoring the immediacy of pattern activity Bestor generally described as probably typical in other similar cases [certainly in Bilyeu v. Clinton/Federal Government, 01-cv-0321 RWR, 02-5008], and

ignoring the litigation sequence Bestor detailed, Bestor now petitions for certiorari.

ARGUMENT

THE STRICKLAND NOTICE REQUIREMENT

Ham v. Smith, 653 F2d 628 at 631:
The Government urges that, even if pro se litigants in Ham's position generally should be given clear information concerning court procedures, we should affirm the district court's judgment in this case because Ham's suit is frivolous. We decline....

Fox v. Strickland, 837 F.2d 507 at 509:
We concluded that it was error to enter summary judgment without first explaining to the plaintiff the nature of the motion [con't: 'or fully considering whether plaintiff had adequate time to respond to it'] ....Consistent with our ruling in Ham, it was incumbent upon the district court, in this case, to inform Fox of the pendency of the defendant's motion and to accord him an "explanation of the risks attending failure to respond to a summary judgment motion." Ham v. Smith, 653 F.2d at 630. This the district court did not do.
Accordingly, because the district court dismissed Fox's complaint without providing him with adequate notice of the requirements of the summary judgment rule, we vacate the dismissal order and

remand the case to the district court for further proceedings consistent with this opinion.

Works for Bestor. Even if the FBI did sneak back in last night and replace their filing deep in the United States Court of Appeal for the District of Columbia files, he should have gotten a real warning or an applicable warning in the district court.

A STRICKLAND NOTICE 'SHOULD BE REAL' REQUIREMENT

Hudson v. Hardy, 412 F2d 1091 (1968) at 1094:
We stress the need for a form of notice sufficiently understandable to one in appellant's circumstances fairly to apprise him of what is required... Merely providing notice of the technical requirements of the summary judgment rule, of course, cannot be expected in every case fully to compensate for the handicaps resulting from [there detention, here the 552(b)(1) 'Glomar response']. It may be that, even if apprised of the need for a factual response to appellee's summary judgment motion, appellant would have lacked sufficient access to sources of proof, understanding of the legal issues involved, or ability to express himself, to demonstrate the existence of a question of material fact.

Noting petitioner requested assistance in obtaining counsel much earlier in the litigation sequence, see Bestor v. United States 1:02-cv-0279 RWR and

Bestor v. Ashley 02-cv-01583 RWR, we continue with the Hudson citation:

In a proceeding of this kind, the District Court has discretion with respect to appointment of counsel, and we do not suggest that the initial denial of appellant's motion for counsel constituted an abuse of that discretion.

--- Please read the following portion of Hudson at 1095 with emphasis ---

We conclude by noting that considerable flexibility and a wide range of alternatives are available to the District Court in dealing with the problem presented by this case. One possibility, of course, would be simply to deny summary judgment and hold an evidentiary hearing.

Footnote 12 at 1095: The District Court, of course, has discretion to deny summary judgment where the interests of judgment so dictate. 6 MOORE, FEDERAL PRACTICE, 56.15 [6] (2d ed. 1966). Permitting the [plaintiff/petitioner] to appear in person and testify in his own behalf may, at least in some cases, be both fairer and a more economical "means of discovering the bases of his complaints and assaying the credibility of his representations." Phillips v. United States Board of Parole, supra, 122 U.S.App.D.C. at 238, 352 F.2d at 714; see United States ex. rel. Wissenfeld v. Wilkins, 281 F.2d 707, 715-716 (2d Cir. 1960). Other means of dealing with ['Glomar-ed' appellant] complaints may occur to the District Court which afford substantial justice without imposing undue burdens on the court, the

bar, or those who are called upon to defend such suits. We repeat, however, that any procedure chosen must be such as to "assure that the ['Glomar-ed' appellant's] claims receive fair, adequate, and meaningful consideration." United States ex rel. Wissenfeld v. Wilkins, supra, at 716 [cited in Hudson v. Hardy, 412 F.2d 1091 at 1095 (U.S.App.D.C. 1968)]. Since the procedure followed in this case was deficient measured by those standards, we vacate the judgment appealed from and remand for further proceedings consistent with this opinion.

BURDEN OF PROOF

Hudson v. Hardy, 412 F2d 1091 (1968) at 1093:

It is well settled that a complaint may not be dismissed for failure to state a claim upon which relief can be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct 99, 102, 2 L.Ed.2d 80 (1957); Sass v. District of Columbia, 114 U.S. App.D.C. 365, 367, 316 F.2d 366, 368 (1963); [further citation omitted].

The FBI and other agencies have a great deal of material on Bestor. He sourly notes they have more on him than they have on his assailants. In his Complaint and in his 'list of items to be appealed' [the Appeals Court no longer accepts full petitions never mind briefs much less oral argument at least from Bestor] Bestor clearly discussed information 'the FBI has on him' originating with him and

including no one other than him. There is no secret source or 'hidden means' by which the FBI got the information. None. Zero. It is/was Bestor and only Bestor. Given that circumstance, it is absurd for the courts to let the agency's Glomar claim diminish their burden of proof.
The second half of that point is that the very volume of the agency holdings on Bestor seriously undermines the possibility of a Glomar claim covering EVERYTHING.

From Bestor's travel in Europe to his employment in the Pacific, from imaging efforts to medical technologies and mitigation devices....
.... Dementia spiking in old people and increasingly seen in an 'early onset' population, it may be worth noting senators implanted with neuroprosthetics take a neurostimulant which is probably LSD-based to mitigate the radiation. The senators' neuroprosthetic? Not secret. The LSD-based neurostimulant? Secret? You must be joking....
.... from movies Bestor saw to parties he attended, from his public handouts and faxes [in Seattle] to his more formal non-fiction and literary work, it ain't possible for a Glomar claim to cover EVERYTHING.

It ain't possible for a Glomar claim to cover everything, and that is not the threshold test anyway. Any of those points - about neuroprosthetics or his employment in Asia - represents a 'ticket in' to the 5 U.S.C. 552 paragraph (b) exemptions which

includes a 50 USC 435 or Ex. Or. No. 13292 of March 25, 2003, 68 Fed. Reg. 15315 withholding.

"Appellees, of course, had the burden of demonstrating that no genuine issue of material fact existed. 6 MOORE, FEDERAL PRACTICE 56.15 [3] (2d ed. 1966)", cited in Hudson v. Hardy, 412 F.2d at 1094 Footnote 8.

Trying to be a good sport Bestor identified what he knows they have and could easily give him without controversy. The documentation originated with him and he contacted them; on the other hand, playing hardball, Bestor could in theory ask and expect to get 'absolutely everything they have on him' through the courts [several courts, en banc and panel rehearing included]. 'FOIA affords the public access to virtually any federal government record that the FOIA itself does not specifically exempt from disclosure.' 5 U.S.C. 552; Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973).

Unfortunately the courts have let the agency's 'Glomar response' reduce their burden of demonstrating that no genuine issue of material fact existed in a 5 U.S.C. 552 FOIA suit.

Never mind the original brazen lie[s] defendant FBI had a United States Attorney pander to the district court or their sleaze-o 'sneak and peek' which became a 'take and walk' on appeal, the district court's own repeated failure - which Bestor brought to the district court's attention in a timely manner - should equate to plain error and merit reversal or remand.

In re Sealed Case, 326 U.S.App.D.C. 276, 285 (1997).
...The deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need [Note 5]. This need determination is to be made flexibly on a case-by-case, ad hoc basis. "[E]ach time [the deliberative process privilege] is asserted the district court must undertake a fresh balancing of the competing interests," taking into account factors such as "the relevance of the evidence," "the availability of other evidence," "the seriousness of the litigation," "the role of the government," and the "possibility of future timidity by government employees." In re Subpoena Served Upon the Comptroller of the Currency, 967 F.2d 630, 634 (D.C.Cir.1992) (internal quotations omitted) (quoting In re Franklin Nat'l Bank Securities Litig., 478 F.Supp. 577, 583 (E.D.N.Y.1979)); see also Tuite v. Henry, 98 F.3d 1411, 1417 (D.C.Cir.1996).

Note 5: This characteristic of the deliberative process privilege is not an issue in FOIA cases because the courts have held that the particular purpose for which a FOIA plaintiff seeks information is not relevant in determining whether FOIA requires disclosure.... see also Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 771-72 (1989) [which reads]: Our previous decisions establish that whether an invasion of privacy is warranted cannot turn on the purpose for which the request for information is made. Except for cases in which the objection to disclosure is based on

a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request [end citation]. That opinion then goes on to mention subjects of Department of Justice and FBI documentation who were entitled to information as the subjects of the files which Bestor similarly claims to be here, tied back to Bestor overcoming the deliberative process privilege with a sufficient showing of need.

CONGRESSIONAL INTENT ARGUMENT

This Court found 'a sovereignty, on general principle, is not liable for injuries resulting from mob violence of failure to keep the peace' in Turner v. United States, 248 U.S. 354, 357-58 (1919), which is famous in DeShaney, 489 U.S. 198, 109 S.Ct. 998 (1989): 'The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf ... it is the State's affirmative act of restraining the individual's freedom to act on his own behalf - through incarceration, institutionalization, or other similar restraint of personal liberty - which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means....'

The state and its agencies don't owe anybody

anything, or anyway Bestor has never previously been able to get a court to help him, including to image electrodes in his own skull and brain, see Bestor v. United States et seq continuing since 2002.

In the Freedom Of Information Act, however, Congress specifically eliminated all discretionary powers of agencies apart from the 5 U.S.C. 552(b) exemptions which are clearly defined. A court allowing an agency to create 'discretionary space' in denying Bestor's FOIA request thereby directly contradicts the express will of Congress.

CONGRESSIONAL INTENT 'J. SKELLY WRIGHT FOIA HISTORY' SEQUENCE

5 U.S. 552 created an all encompassing jurisdiction in the District of Columbia court system for Freedom Of Information Act litigation. J. Skelly Wright was Chief Judge of the Court of Appeals when he wrote what appears to be a definitive narrative of the legislative process - and intent - behind the laws which got enacted. Bestor believes Wright used substantially the same verbiage on several occasions, but the idea here is illustrating the legislative intent which the courts erode with unjustifiable/unmonitored 'Glomar assertions.' Allen v. Central Intelligence Agency, 636 F.2d 1287, 1294-1297.

1. The legislative history of the 1974 and 1976 Amendments to the FOIA

Underlying enactment of the FOIA in 1966 was the congressional desire to provide "full agency disclosure unless information is exempted under clearly delineated statutory language[.]" S.Rep.No. 813, 89th Cong., 1st Sess. 3 (1965). The courts were given an especially significant role to play in enforcement of the FOIA. Federal District Courts were granted "jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld from the complainant." In such cases, Congress explicitly provided that "the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action."

Unfortunately, the judiciary was at first reluctant to assume fully the difficult supervisory role that Congress had established for it. In EPA v. Mink, 410 US. 73, 93 S.Ct. 827, 35 L.Ed. 119 (1973), the Supreme Court held that the District Courts, in reviewing non-disclosure of a document under Exemption 1, could not engage in in camera inspection of the document. Rather, the Court held that reviewing courts were only charged with the responsibility of ensuring the procedural - not substantive - propriety of the classification. In barring in camera inspection for Exemption 1 claims, the Court observed that "Congress chose to follow the Executive's determination in these matters and that choice must be honored." Id. at 81, 93 S.Ct. at 833. Congress reacted swiftly to the Mink decision. In

1974 it amended the FOIA to provide explicitly that a court engaging in de novo review of an agency nondisclosure "may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemption[s]."

Congress also rewrote Exemption 1 so as to make clear that reviewing courts were charged with the responsibility of reviewing de novo the substantive as well as procedural propriety of the classification. The exemption now covers matters that are
(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order [note 42: 5 U.S.C.(b)(1) (1976). Exemption 1 had previously covered matters "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy." 5 U.S.C. 552(b)(1) (1970)].
The legislative history to the 1974 Amendments to the FOIA demonstrates quite clearly that Congress sought to overrule Mink and facilitate in camera inspection of documents...
Summarized the process sounds like an exciting heavyweight title fight or clash of titans:
"[b]ut bowing to pressure from the President, the [Senate] Committee [on the Judiciary] proposed restrictive language" at 1295;
on "reach[ing] the Senate floor, however, Senator

Muskie introduced an amendment that deleted the restrictive language. After adapting Senator Muskie's amendment, the Senate overwhelmingly passed the amended version of the bill" at 1296;
"the President objected";
"[t]he Conference Committee resisted the pressure of the President and instead reported out a bill that, just as the Senate and House versions had, granted reviewing courts broad discretion to employ in camera inspection" all at 1296 which was "passed overwhelmingly by both houses of Congress."
The President vetoed the legislation.
"Rejecting the objections of the President, Congress overrode the presidential veto" at 1297.

In sum, the 1974 Amendments to the Freedom of Information Act manifest an unmistakable congressional intent to bolster the authority of reviewing courts. The active role that Congress intended the judiciary to play in enforcing the FOIA was emphasized further by amendments in 1976 that were enacted to overrule the Supreme Court decision in FAA Administrator v. Robertson, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975). The case involved Exemption 3 of the FOIA, which at the time covered matters "specifically exempted from disclosure by statute." In Robertson the Court held that this language comprehended a statute that granted a broad degree of discretion on what information is to be protected. Id. at 266, 95 S.Ct. at 2147. Within 15 months Congress overruled the decision by

narrowing Exemption 3 to its present form. The "unmistakable thrust" of the amendment was "to assure that basic policy decisions on government secrecy be made by the Legislative rather than the Executive branch." American Jewish Congress v. Kreps, 574 F.2d 624, 628 (D.C. Cir. 1978)(footnote omitted). The Robertson amendment, like the 1974 Amendments, thus evinced a congressional intent that the de novo review mandated by the Freedom of Information Act be extremely thorough so as "to insure that agencies do not impermissibly expand by unreviewed interpretations the 'particular types of matters' Congress has exempted from disclosure. Ray v. Turner, 587 F.2d 1187, 1221 (D.C.Cir.1978) (Wright, C.J., concurring).

The judicial reluctance to assume an active role in reviewing FOIA claims is reflected in both the Mink and Robertson decisions. In response Congress has plainly attempted to strengthen the de novo review that courts must engage in. While Congress has not mandated in camera inspection for any particular subset of FOIA cases, it has nevertheless made clear - by the concern reflected in the 1974 and 1976 Amendments for a thorough and meaningful de novo review - that in certain cases such in camera inspection "will plainly be necessary and appropriate." H.R.Rep.No. 93-1380, 93d Cong., 2d Sess. 8, U.S.Code Cong. & Admin.News 1974, p. 6267, reprinted in Source Book at 226. Congress, however, never isolated those instances in which in camera inspection of the requested document is

"plainly *** neccssary." While we in no way mean to minimize the broad discretion granted trial courts over whether to conduct in camera inspection, we think it appropriate in this case to outline some considerations that trial courts should take into account in exercising that discretion.
Wright continuing in Allen v. Central Intelligence Agency at 1298:
2. Considerations Supporting in camera inspection
a. Judicial economy
In conducting its de novo review, a trial court should first offer the agency the opportunity to demonstrate, through detailed affidavits and oral testimony, that the withheld information is clearly exempt and contains no segregable, nonexempt portions. See EPA v. Mink, supra, 410 U.S. at 73, 93 S.Ct. at 829."
[Unfortunately, in the case at bar it appears the agency undertook 'fraud on the court' with a 'bad faith' affidavit as became evident on appeal when it turned out they had perhaps entered a false filing in lieu of asserting a Glomar response].
"Courts have been reluctant, however, to conduct in camera inspection, favoring instead the other options available."

[Noting Bestor specified only a few documents in his Complaint] "Where the examination of the requested documents requires herculean labors because of their volume, the reluctance to conduct such inspection is understandable. But when the requested documents are few in number and short in length [as the ones

Bestor initially sought], such reluctance frequently exacts a cost from the parties and courts in time and money. An examination of the documents themselves in those instances will typically involve far less time than would be expended in presentation and evaluation of further evidence. The other procedures are usually nothing more than surrogates for in camera inspection. And, when utilization of these surrogates has not proven fruitful, the court not infrequently finds it necessary to conduct in camera inspection - often by direction of an appellate court after a costly appeal has been pursued by the plaintiff."

Perhaps the most important point is that the Congressional intent is crystal clear in BOTH the legislative history behind the law - in camera inspection "will plainly be necessary and appropriate." H.R.Rep.No. 93-1380, 93d Cong., 2d Sess. 8, U.S.Code Cong. & Admin.News 1974, p. 6267, reprinted in Source Book at 226 - and in the law itself at 5 U.S.C. 552(b). "Congress reacted quickly to the Mink decision. In 1974 it amended the FOIA to provide explicitly [for in camera review]... Congress also rewrote Exemption 1 so as to make clear that reviewing courts were charged with the responsibility of reviewing de novo the substantive as well as procedural propriety of the classification. J. Skelly Wright had the gift of prophesy in anticipating pretty much exactly what happened to Bestor here without in camera inspection: having

pursued the "costly appeal" he is hopeful this Court will direct the lower court to conduct the inspection or will itself hear his petition. 'Sneak an' peek' leading to a 'take an' walk' they may be trying to lie about now, or even in their affidavit game, Wright understood there needs to be a penalty associated with misbehavior on the part of the government.

1298: Bad faith on the part of the agency
Where there is evidence of bad faith on the part of the agency, the representations of the agency lose all trustworthiness. In camera inspection in such situations is "plainly necessary" unless it is clear to the court that the withholding by the agency would not be sustainable after in camera inspection.
Too late in the day discovering 'a typo' in the file number - belatedly claiming 62C-HQ-1077229 is NOT Bestor's FBI file number or identifier after the extensive query/appeal/district court litigation/ appeal had already been undertaken -
the agency has lost their credibility. How can they be sure there is nothing in the file if they couldn't even get the file number right? Equally stunning is that United States Attorneys are apparently unable to themselves immediately check basic facts in response to a direct court order. J. Skelly Wright's opinion in Allen makes the situation black and white:
"Evidence of bad faith... lose ALL trustworthiness" [emphasis added].

ANSWERING THESE QUESTIONS

Bestor cannot state with certainty the missing Strickland warning fueled the district court's subsequent standards error - it seems likely that it did - but whether that is two separate problems or two aspects of the same problem he should have prevailed, the difference being the one offering him a chance to cross the threshold [in a FOIA case, where the threshold is suppose to be a pretty low one] and the other taking him across the threshold.

The FBI lied to the district court about the Glomar situation, only to be apparently inadvertently smoked out by the court of appeals, which then covered the FBI newly asserting and then quickly removing 'the transient Glomar filing' - which is absolutely farcical. Absurd. This is your court system? More violent, was judicial process in the Soviet Union or under the military governments of Latin America significantly more corrupt?

Because a Strickland warning here should have alerted the pro se plaintiff to his need to contest the 5 U.S.C. 552(b) exemptions,

because an agency asserts a 'Glomar response' essentially as an Alford plea 'acknowledging the situation without admitting guilt but trusting in the district court' and the district court's failure to Bestor equates to a process deprivation, and

because the district court erroneously let the agency's Glomar allegation reduce their burden of demonstrating that no genuine issue of material fact existed in this 5 U.S.C. 552 FOIA suit, or because the agency flat out lied including to the district court,

and because the United States Court of Appeals for the District of Columbia permitted that and ruled against Bestor without giving him a chance to argue there either, on top of the 'problematic though transient' composition of the panel relative to the Best v. Kelly footnote on electrodes,

this Court must remand this case or hear Bestor.

This Court accepting his petition, Bestor, now a pro se litigant, will arrange for counsel to articulate his points at oral argument, requiring they be admitted to the Supreme Court bar which apparently is a minor procedural step.

Respectfully submitted,

Andrew Bestor, *pro se* [Petitioner]
144 11th St. SE
Washington D.C., 20003
(202) 904-4763

APPENDIX 1

OPINION[S] BEING APPEALED

PLEASE NOTE.

The Court of Appeals Order affirming the district court does NOT mention that upon direct inquiry the FBI admitted they had made a mistake, then claiming the file number in question ["62C-HQ-1077229"] is actually a typographical error [21 Oct 2008 REPLY FILED].

For obvious reasons - certainly if they had a role in it - the Court of Appeals Order also fails to note the District Court Opinion was altered.

The Order also ignores the other evidence Bestor brought the courts, including:

about a 'female agent of the day in Seattle' somehow checking on Bestor in the course of a telephone call with a computerized search capability complete with data access and file which may ultimately be shielded from discovery under a paragraph (b) exemption but must be considered in evaluating Bestor's threshold claim, and

about an extensive pattern of activity also seen in other cases such as Bilyeu v. Clinton which became Bilyeu v. Federal Government, 01-cv-00321 RWR, appealed as 02-5008 Ginsburg, Randolph, Garland, with Bestor claiming racketeering pivots on patterns of activity rather than always particular instances.

ORDER

United States Court of Appeals For The District Of

Columbia Circuit
No. 08-5076, September Term 2008, 1:06-cv-01745,
Filed On: December 23, 2008
Andrew S. Bestor, Appellant
v.
Federal Bureau Of Investigation, Appellee

Before: Henderson, Brown, and Kavanaugh, Circuit Judges
ORDER
Upon consideration of the motion for summary affirmance, the opposition and the supplements thereto, the reply, and the lodged surreply and the supplements thereto, it is
ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987)(per Curiam).
--- which Bestor additionally questions to the extent that case was full of procedural steps which were followed there and are absent here ---
The affidavits the Federal Bureau of Investigation ("FBI") provided to this court and the district court "show beyond a material doubt that it has conducted a search reasonably calculated to uncover all relevant documents" under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552. Morley v. CIA, 508 F.3d 1108, 1114 (D.C. Cir. 2007)(quoting Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). The FBI has explained that a file number

appeared at the bottom of a released document because the relevant file contains all correspondence from the FBI to members of Congress regarding inquiries from their constituents. The number indicated that a copy of the document, a letter to a former U.S. Senator, had been placed in the file.
--- Again, please note that isn't exactly true. The FBI claims the original number in question [62C-HQ-1077229] was a typo, and that court did not at all address other affidavit claims such as identifying the agent in Seattle who was known to have a file access though that might have been shielded from discovery by a (b) exemption ---
Thus, the reference to this file number in the released document the existence of additional evidence of additional responsive records. See Meeropol v. Meese, 790 F.2d 942, 954 (D.C. Cir. 1986). The district court correctly held that Bestor's other arguments are merely "speculative claims about the existence of other documents" that "do not rebut the presumption of good faith" or create genuine issues of fact, making summary judgment appropriate. See Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004) (holding that "mere speculation that as yet uncovered documents might exist" is not enough to "undermine the determination that the agency conducted an adequate search for the requested records").

Pursuant to D.C. Circuit Rule 36, this disposition will not be punished. The Clerk is directed to

withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41. Per Curiam

APPENDIX 2

LETTER FROM THE FBI WITH FILE NUMBER
This is the origin of the file number controversy.

Case 1:06-cv-01745-RMU Document 1 Filed 10/12/2006 Page 5 of 5
October 26, 2001
Honorable George Allen
United States Senator
507 East Franklin Street
Richmond, VA 23219
Dear Senator Allen:
I am writing in response to your September 27th communication on behalf of Mr. Andrew S. Bestor. Mr. Bestor alleges, among other things, that he is being harassed by the "nation of Japan."
In order for the FBI to initiate an investigation of any complaint we receive, specific facts must be set forth to indicate that a violation of federal law within our investigative jurisdiction has occurred. As much as we would like to be of assistance to Mr. Bestor, Japanese sovereignty issues prevent us from intervening in that country's internal affairs. I want to assure him that the FBI is not involved in

activities of the kind that he mentioned. Should Mr. Bestor have any evidence that representatives of Japan's construction industry or other groups are engaging in criminal activities in the United States that he believes are in violation of any federal laws falling within the investigative jurisdiction of the FBI, I encourage him to provide details of such activities to our Washington Field Office, 601 Fourth Street, Northwest, Washington, D.C. 20535-0002, telephone number 202-278-2000.

I hope this information will be helpful to you in responding to Mr. Bestor. Your enclosures are being returned as requested.

Sincerely yours,

Arthur Radford Baker

Unit Chief

Office of Public and Congressional Affairs

Enclosures

1 - ADIC, WFO - Enclosures

1 - LEGAT, Tokyo - Enclosures

1 - SAC, Richmond - Enclosures

1 - IOS, ISD (room 7443) - Enclosures

1 - Congressional Affairs Office (Room 7240) - Enclosures

62C-HQ-1077229 [- 13190 [handwritten]]

NOTE: Based on available information, the only reference in ACS records possibly identifiable with Andrew S. Bestor is a FOIPA request.

JB